IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No.....

CHRISTINE WILSON and MARGARET JOYNER,
Petitioners,

vs.

BEATRICE FUHRHOP, GERTRUDE AUSTIN,
WILLIAM S. WILSON, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

and

BRIEF IN SUPPORT THEREOF.

R. O. KENLEY,
Longview, Texas,
GUY A. THOMPSON,
SAMUEL A. MITCHELL,
RICHARD D. SHEWMAKER,
705 Olive Street,
St. Louis, Missouri,
Attorneys for Petitioners.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

Page

Petition for writ of certiorari..... 1-9

Summary statement of the matter involved..... 2

Jurisdictional statement 5

The questions presented..... 7

Reasons relied on for the allowance of the writ..... 8

Brief 10-15

Argument 10

Cases Cited.

Cooper v. McCoy, 116 Ark. 501, 173 S. W. 412..... 3

Clark v. Williard, 292 U. S. 112, 78 L. ed. 1160.....7, 9, 12

Evatt v. Mier, 114 Ark. 84, 169 S. W. 817..... 3

Fall v. Eastin, 215 U. S. 1, 54 L. ed. 65.....13, 14

Ferry v. Spokane, Portland & Seattle Railway Co., 258 U. S. 314, 66 L. ed. 635..... 11

Fuhrhop v. Austin, 385 Ill. 149, 52 N. E. (2d) 267..... 10

Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867..... 14

Hood v. McGehee, 237 U. S. 611, 59 L. ed. 1144..... 13

In re McNamara's Estate, 181 Cal. 82, 183 Pac. 552, 7 A. L. R. 313..... 13

John Hancock Mutual Life Insurance Co. v. Yates, 299 U. S. 178, 81 L. ed. 106.....7, 9, 10

McNamara v. McNamara, 303 Ill. 191, 135 N. E. 410...5, 12

Miller v. Miller, 91 N. Y. 315..... 14

Olmsted v. Olmsted, 216 U. S. 386, 54 L. ed. 530, affirming 190 N. Y. 458, 83 N. E. 569..... 13

Williams v. North Carolina, 317 U. S. 287, 87 L. ed. 279, 143 A. L. R. 1273.....7, 9, 11

Statutes Cited.

Illinois Revised Statutes 1943, ch. 3, Sec. 162..... 12
Pope's Dig. Ark. Stat. 1937, Sec. 4342.....3, 5, 7
United States Code, Sec. 344 (b)..... 5

Textbook Cited.

Restatement of the Conflict of Laws, Sections 245, 246 .....11, 12

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PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of Illinois.

Christine Wilson and Margaret Joyner, petitioners, pray that a writ of certiorari issue in this cause to review the final judgment and order of the Supreme Court of Illinois made on the 16th day of November, 1943 (R. 47-48), against petitioners and in favor of Beatrice Fuhrhop, Gertrude Austin, William S. Wilson, Thomas C. Wilson, E. J. Karsch, administrator of the estate of Fred Walter Wilson, deceased, and E. J. Karsch, executor of the last will and testament of Sydner E. Wilson, deceased, respondents herein, and for their petition for such writ state:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case is a partition suit begun September 11, 1942 (R. 2), in the Circuit Court of Randolph County, Illinois. It was submitted on the pleadings and a stipulation of facts (R. 23). Its purpose was to determine the heirs of Fred Walter Wilson, who died intestate owning the land in question (R. 23). No other question was in dispute. Fred Walter Wilson left surviving him, as his only possible heirs, his mother, Sydner, four full brothers and sisters, and two half sisters, the petitioners Christine and Margaret (R. 23), recognition of whose legitimate status created by a statute of Arkansas was denied by the Supreme Court of Illinois (R. 47).

This suit was begun by a complaint filed by one of the full sisters of the intestate (R. 2). It alleged that the present petitioners "have or claim to have some interest" in the premises (R. 4). The remaining full brothers and sisters were made defendants, as was also the administrator of the intestate and the executor of the intestate's mother, who died in July, 1942 (R. 25), after the intestate died, but before the beginning of this suit. The only other defendants were the present petitioners.

The present petitioners filed an answer and counterclaim (R. 10), to which motions to strike and dismiss were filed and overruled (R. 16, 17), after which the remaining defendants answered both the complaint and counterclaim (R. 18, 19) and the plaintiffs answered the counterclaim (R. 19). The Circuit Court entered a decree of partition establishing the rights of petitioners as heirs (R. 29-31). This decree was reversed by the Supreme Court of Illinois (R. 48) with directions to enter a decree in accordance with its opinion (R. 40). It is this judgment of the Supreme Court of Illinois which petitioners seek to have reviewed.

The father of the intestate and his full brothers and sisters, and also of the petitioners, was Abner M. Wilson (R. 23, 24). Abner M. Wilson, in August, 1912, married Liza E. Newsom by a ceremonial marriage performed in Arkansas pursuant to the laws of that state by a justice of the peace of that state after a license had been obtained in accordance with the laws of Arkansas (R. 24). At the time his first wife, the mother of the intestate and his full brothers and sisters, was living and undivorced (R. 25). The second wife, Liza, contracted her marriage to Abner in good faith and did not then nor at any time prior to the birth of petitioners know any fact by reason of which her marriage would be unlawful or void (R. 24). She and Abner lived together as husband and wife at all times after their marriage until after the birth of petitioners (R. 24). Of that marriage petitioners were born in Arkansas, Margaret on May 29, 1913, and Christine on December 7, 1919 (R. 24). At the time of their marriage, and at all times before the birth of Christine and Margaret, and at the times of the birth of Christine and Margaret, Abner and Liza were residents of and domiciled in the State of Arkansas (R. 24). Christine and Margaret were born in Arkansas and it was the state of their domicile at birth (R. 24).

When Christine and Margaret were born Arkansas had a statute in force (it had been in effect since 1837, R. S. Ark. 1837, Ch. 49, Sec. 5) which now appears as Pope's Dig. Ark. Stat. 1937, Sec. 4342, providing as follows:

> "The issue of all marriages deemed null in law, or dissolved by divorce, shall be deemed and considered as legitimate."

This statute, particularly in view of the construction placed upon it by the Supreme Court of Arkansas in **Evatt v. Mier,** 114 Ark. 84, 169 S. W. 817, and **Cooper v. McCoy,** 116 Ark. 501, 173 S. W. 412, made the petitioners legitimate at birth. This statute was pleaded as a public act

entitling the legitimate status of the petitioners to recognition under the full faith and credit clause of the Constitution of the United States (R. 13-14).

The Supreme Court of Illinois in its opinion (R. 42-43) stated the respective contentions of the parties. One of the contentions of the appellants (the present respondents) is stated by the Supreme Court of Illinois as follows (R. 43):

> "The full-faith-and-credit clause of the constitution does not require the Illinois court to apply the law of Arkansas where there is a conflict and the Arkansas law is contrary to the public policy of Illinois."

The Court then said (R. 43):

> "The appellees insist: * * *
>
> "The full-faith-and-credit clause of the Constitution of the United States requires the recognition of legitimation given by the statute of Arkansas."

The Court adopted the contention of the appellants, saying (R. 47):

> "The full-faith-and-credit clause of the Federal constitution does not require the Illinois courts to apply the Arkansas law in a case determining the descent of real estate where it is in conflict with the Illinois law or the public policy of the State."

The Court also held (R. 47):

> "The decree of the circuit court of Randolph county was based upon the theory that the cross-complainants were entitled by way of descent to share in the real estate in Illinois sought to be partitioned, as the legitimate children of Abner M. Wilson, and that the Illinois courts were required to recognize the Arkansas law and apply it to the facts in this case. In this we think the court was in error."

The Court thus refused to recognize the status of petitioners as legitimate, on the ground that to do so would

be against the public policy of Illinois, although that status had been conferred upon them by a statute of the state of their and their parents' domicile at the time of their birth.

The opinion further shows (R. 45), in the Court's discussion of **McNamara v. McNamara**, 303 Ill. 191, 135 N. E. 410, that the Court thought that a **judgment** establishing legitimacy under a statute of the domicile would have to be given full faith and credit, so as to enable the legitimated child to inherit land in Illinois, but that a legitimate status shown by stipulated facts to have been created by such a statute would not have to be recognized. For a discussion of this see the attached brief.

JURISDICTIONAL STATEMENT.

This Court has jurisdiction to review the judgment in question under Section 344 (b) of the United States Code; that judgment was rendered by the Supreme Court of Illinois, which is the highest court of that state, and denied to petitioners rights and privileges, claimed and set up by them under the full-faith-and-credit clause of Section 1 of Article 4 of the Constitution of the United States, to have their legitimate status created by a public act and statute of Arkansas recognized by the courts of Illinois, the statute of Arkansas involved being found in Pope's Dig. Ark. Stat. 1937, Sec. 4342, and reading as follows:

> "The issue of all marriages deemed null in law, or dissolved by divorce, shall be deemed and considered as legitimate."

This petition is timely since the judgment of the Supreme Court of Illinois in question was rendered on November 16, 1943 (R. 47-48), and the petition for rehearing was denied by that Court on January 17, 1944 (R. 62).

The constitutional question mentioned was first raised in the trial court by the answer and counterclaim of peti-

tioners (R. 13-14, 15), in which the facts establishing the legitimate status of petitioners were pleaded and the Arkansas statute in question was pleaded and it was alleged (R. 14) that petitioners are "the legitimate children of said Abner M. Wilson and the lawful sisters of said Fred Walter Wilson, and are entitled to be considered as such for all purposes in this state, both by reason of the law of Illinois and by reason of the fact that the State of Illinois is required by the Constitution of the United States to give full faith and credit to the public act and statute of the State of Arkansas above mentioned." The decree of the trial court specifically found (R. 30-31) that "Said defendants Christine Wilson and Margaret Wilson Joyner are entitled to be recognized as, and are, the legitimate sisters and heirs at law of said Fred Walter Wilson." Under the practice of the Supreme Court of Illinois the appellants' assignments of error were included in appellants' brief and are not a part of the record, but it appears from the opinion of that Court that the constitutional question involved was raised by both sides (R. 43) and that the Court held (R. 47) that the holding of the trial court that petitioners were to be recognized as legitimate children of Abner M. Wilson was error, and that the full faith and credit clause did not require such recognition. The constitutional point in question was reiterated by petitioners in their petition for rehearing (R. 60), which was overruled (R. 62).

This case is a suit for the partition of land located in Illinois and the question is whether petitioners are heirs of their deceased half brother who died intestate owning the land; that question depends on whether the petitioners were legitimate or illegitimate; the federal question presented is whether petitioners' personal status as legitimate, conferred upon them by a statute of Arkansas, where petitioners and their parents were domiciled when petitioners were born, must be recognized under the full faith and credit clause. That question is substantial; the precise

question has never been passed on by this Court (see the attached brief for the distinguishing of certain cases), and its substantial character is indicated by the cases of **Williams v. North Carolina**, 317 U. S. 287, 87 L. ed. 279, 143 A. L. R. 1273; **John Hancock Mutual Life Insurance Co. v. Yates**, 299 U. S. 178, 81 L. ed. 106, and **Clark v. Williard**, 292 U. S. 112, 78 L. ed. 1160.

THE QUESTIONS PRESENTED.

1. Did the Supreme Court of Illinois err in holding that the Illinois courts are not required under the full faith and credit clause of the Constitution of the United States to apply the Arkansas statute (Pope's Dig. Ark. Stat. 1937, Sec. 4342) in determining whether petitioners were legitimate or illegitimate?

2. Did the Supreme Court of Illinois err in holding that the full faith and credit clause of the Constitution of the United States does not require the courts of Illinois to apply the Arkansas statute above mentioned in order to determine the personal status as legitimate or illegitimate of persons born domiciled in Arkansas, in a case determining the descent of real estate located in Illinois?

3. Did the Supreme Court of Illinois err in holding that while it was required to give full faith and credit, for the purpose of determining heirship to real estate, to an adjudication of legitimacy acquired under the statutes of the domicile of the person whose legitimacy was in question, it was not required to recognize the legitimate status of petitioners when that status was not established by an adjudication, but was shown by stipulated facts to have been created by the Arkansas statute above mentioned?

4. Did the Supreme Court of Illinois err in reversing the decree of the trial court with directions in effect to enter a decree denying recognition of the legitimate status of

petitioners acquired under the Arkansas statute above mentioned, and therefore finding that they were not heirs of Fred Walter Wilson?

5. Did the Supreme Court of Illinois err in holding that the fact that the descent of real estate is governed by the law of the state of the situs of the real estate, makes it unnecessary for the courts of Illinois to treat petitioners as legitimate and recognize their legitimate status conferred upon them by the Arkansas statute above mentioned?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Supreme Court of Illinois has decided a federal question of substance not heretofore determined by this Court. The precise question here involved has never been determined by this Court. In the present case the only state which had any interest in petitioners gave them, by statute, a legitimate status at birth. It was the state where their parents went through a form of ceremonial marriage, the state where petitioners were born, and the state where the parents of petitioners were domiciled at the time of their ceremonial (though void) marriage, where the parents of petitioners lived together as husband and wife and were domiciled at all times after their marriage until the birth of petitioners, and where the parents of petitioners were domiciled at petitioners' birth. It was the domicile of petitioners at their birth. All of these facts were stipulated (R. 24). In no case has this Court passed on the question whether legitimacy so obtained may be denied by the courts of another state on the ground that it is against the public policy of that state to recognize it.

2. The question presented was decided in a way not in accord with decisions of this Court which, though not precisely in point, are applicable. The decisions particularly

relied on are **John Hancock Mutual Life Insurance Co. v. Yates**, 299 U. S. 178, 81 L. Ed. 106; **Williams v. North Carolina**, 317 U. S. 287, 87 L. Ed. 279, 143 A. L. R. 1273, and **Clark v. Williard**, 292 U. S. 112, 78 L. Ed. 1160. Arkansas had no less interest, and no less exclusive interest, in the personal status of petitioners than New York had in the insurance contract involved in the John Hancock case. If a man divorced under the circumstances involved in Williams v. North Carolina should remarry and have children, no state could deny a legitimate status to the children on the ground that the divorce was invalid. If a state must, as in Clark v. Williard, recognize, in determining what should be done with the property of a dissolved corporation, the status of a "successor to the corporate personality with a title derived from the status of the domicile," it must equally recognize the legitimate personal status of an individual conferred by a statute of the state having full jurisdiction to confer it.

R. O. KENLEY,
Longview, Texas,
GUY A. THOMPSON,
SAMUEL A. MITCHELL,
RICHARD D. SHEWMAKER,
705 Olive Street,
St. Louis, Missouri,
Attorneys for Petitioners.

BRIEF.

The opinion of the Supreme Court of Illinois in this case is reported as Fuhrhop v. Austin, 385 Ill. 149, 52 N. E. (2d) 267. The grounds on which jurisdiction is invoked are stated in the attached petition for certiorari. The summary statement included in the petition for certiorari is, we believe, a sufficient statement of the case.

ARGUMENT.

The Supreme Court of Illinois was required by the full-faith-and-credit clause of the Constitution of the United States to treat petitioners as legitimate and recognize the legitimate status conferred upon them by the statute of Arkansas, since Arkansas was the state where they and their parents were domiciled when petitioners were born.

We submit that a legitimate status conferred upon an individual at birth by a statute of the state of the domicile of himself and his parents at the time of his birth, must, under the full-faith-and-credit clause be recognized by the other states of the Union for all purposes. If the fact that that person was also born in the state of his domicile, and that his parents went through a form of ceremonial marriage in that state and while domiciled in that state, be deeemed to strengthen the jurisdiction to confer a legitimate status, those facts are present here (R. 24). There is just as much reason for requiring universal recognition of a status conferred by statute by the only state having any power over or interest in the petitioners and their parents, as there was for holding that the New York statute which "became a term of" (299 U. S., l. c. 182, 81 L. ed., l. c. 109) the insurance contract involved in **John Hancock Mutual Life Insurance Company v. Yates**, 299 U. S. 178, 81 L. ed. 106, had to be treated as a term of that contract for all purposes and in every state.

Suppose a man should obtain a divorce in a state having jurisdiction to grant it (either under circumstances like those involved in **Williams v. North Carolina**, 317 U. S. 287, 87 L. ed. 279, 143 A. L. R. 1273, or at the matrimonial domicile after personal service on his wife). Suppose he should then remarry and die. Would any state be entitled to refuse to treat his second wife as his lawful widow? Would not a state in which he owned real estate when he died have to treat her as his widow for the purpose of determining whether she was entitled to dower? The right to dower is not protected by the privileges and immunities clause of Article 4 of the Constitution so as to prevent a state from allowing dower to a nonresident only in lands of which the husband died seized, while allowing dower to residents in lands of which the husband was seized at any time during coverture. **Ferry v. Spokane, Portland & Seattle Railway Co.**, 258 U. S. 314, 66 L. ed. 635. But even in such state would not the second wife have to be recognized as the lawful widow in the case we have supposed, whatever her rights as such widow might be under the law of situs?

Similarly, if a man who had validly divorced his first wife should remarry and have children, could any state deny the legitimate status of the children on the ground that it was against the public policy of that state to recognize the validity of the divorce? And if such legitimate status must be recognized even though the divorce was obtained under the circumstances involved in Williams v. North Carolina, must not a legitimate status, conferred by statute by the state of the domicile of a child and his parents at the time of the child's birth, be likewise recognized, even though the marriage of the child's parents was for some reason void?

Of course the descent of real estate is determined by the law of the situs. That law may make the right to inherit depend upon something besides legitimacy. **Restate-**

ment of the Conflict of Laws, Sections 245, 246. But, in applying its laws relating to inheritance, the state of the situs must recognize the existence of personal status acquired in another state by force of a judgment or statute entitled to full faith and credit under the Constitution. There is just as much reason for requiring such recognition in the case at bar as there was in **Clark v. Williard,** 292 U. S. 112, 78 L. ed. 1160, for requiring the State of Montana to recognize, in determining the claims of judgment creditors to the property located in Montana belonging to a dissolved surety company, the status of the Insurance Commissioner of Iowa as the "successor to the corporate personality with a title derived from the state of the domicile."

The Illinois statute which determined the descent of the real estate involved in this case is **Illinois Revised Statutes 1943, Ch. 3, Section 162.** It provides as follows:

> "The intestate real and personal estate of a resident decedent and the intestate real estate of a non-resident decedent after all just claims against his estate are fully paid, descends and shall be distributed as follows: * * * Fifth, when there is no surviving spouse or descendants but a parent, brother, sister or descendant of a brother or sister of the decedent: the entire estate to the parents, brothers, and sisters of the decedent in equal parts, allowing to the surviving parent, if one is dead, a double portion and to the descendants of a deceased brother and sister per stirpes the portion which the deceased brother or sister would have taken if living."

The Supreme Court of Illinois, in **McNamara v. McNamara,** 303 Ill. 191, 135 N. E. 410, which is discussed in the opinion (R. 44-45), held that the child of residents of California, born of an unmarried father and a mother who at all times before the death of the father was married to another man (her divorce did not become final until Nov.

23, 1916, which was after the father's death), was entitled to inherit Illinois real estate, because he had been made the legitimate son of his father by certain acts of legitimation under a California statute. Illinois did not then have and does not now have any legitimation statute similar to the California statute involved. The parties to the Illinois case had previously litigated in the courts of California the question of the child's legitimacy, **In re McNamara's Estate**, 181 Cal. 82, 183 Pac. 552, 7. A. L. R. 313, and the Supreme Court of California in the case cited had held the child to be the legitimated child of his father in spite of the presumption that a child born in wedlock is the child of his mother's husband. The Supreme Court of Illinois, in the case at bar, distinguishes the McNamara case (R. 45) on the basis of the holding in that case that the legitimacy of the child in question had been conclusively determined by the California adjudication.

It is submitted that the legitimacy of persons entitled under the Illinois statute to inherit if they are legitimate must be recognized, and full effect must be given to it, whether its existence is shown by proof of an adjudication in the state of the domicile or by stipulated facts which show legitimacy conferred by a statute of the domicile.

The cases of **Hood v. McGehee**, 237 U. S. 611, 59 L. ed. 1144; **Olmsted v. Olmsted**, 216 U. S. 386, 54 L. ed. 530, affirming 190 N. Y. 458, 83 N. E. 569, and **Fall v. Eastin**, 215 U. S. 1, 54 L. ed. 65, are distinguishable. In Hood v. McGehee, Mr. Justice Holmes specifically held that the denial of the right of McGehee's adopted children to inherit land located in Alabama was based on the construction of the Alabama statute of descent, which construction the Court said "does not deny the effective operation of the Louisiana proceedings, but simply reads the Alabama statute as saying that, whatever their relation to the deceased by virtue of what has been done, the law does not devolve

his estate upon them." This is very different from a denial of recognition to a legitimate status such as occurred in the case at bar.

Olmsted v. Olmsted is based largely on **Haddock v. Haddock**, 201 U. S. 562, 50 L. ed. 867, and it is apparent from the citation by the New York Court of Appeals of the case of **Miller v. Miller**, 91 N. Y. 315 (a leading case for the proposition that a child legitimated under the laws of another state can inherit land in the state of the situs), that it is not based on any reluctance to recognize a legitimate status conferred by a state having full jurisdiction to confer it. In any event, the facts of the Olmsted case are unlike those of the case at bar.

Fall v. Eastin, we believe, can be best explained on the ground stated in the concurring opinion of Mr. Justice Holmes, where he says:

> "But the Nebraska court carefully avoids saying that the decree would not be binding between the original parties, had the husband been before the court. The ground on which it goes is that to allow the judgment to affect the conscience of purchasers would be giving it an effect in rem."

There are statements in various opinions by this Court (e. g., the concluding statement in Olmsted v. Olmsted) similar to the statements in the opinion of the Supreme Court of Illinois in the case at bar (R. 46) to the effect that descent of land is "exclusively subject" to the law of the situs and that statutes of foreign states cannot control the devolution of title to land. These statements do not answer the question presented in the case at bar, which is whether, in applying the statutes of descent and distribution of Illinois, the Supreme Court of Illinois could properly treat petitioners as illegitimate and deny recog-

nition to the legitimate status conferred upon them by statute by the only state which had anything at all to do with them and their parents at the time of their birth.

Respectfully submitted,

R. O. KENLEY,
Longview, Texas,
GUY A. THOMPSON,
SAMUEL A. MITCHELL,
RICHARD D. SHEWMAKER,
705 Olive Street,
St. Louis, Missouri,
Attorneys for Petitioners.